payment from the general contractor (Tr. 286). Final payment was received by Smith and Loveless on February 15, 1963 (Tr. 286). Three days later petitioner Sopher contacted Smith to arrange a meeting (Tr. 48–49). It was agreed that $3,087 in cash, ten percent of the contract price, would be paid in bills of small denomination (Tr. 288).

On May 7, 1963, at a motel restaurant in Chicago, the meeting took place under F.B.I. surveillance (Tr. 290–291, 387–388). Smith carried a concealed wire recorder which had been placed on his person by an F.B.I. agent (Tr. 1105–1106, 1118–1119). In the course of their conversation, Smith and petitioner Sopher discussed the fact that petitioners Ryan and Tibbles had failed to win reelection to the city council, but petitioner Sopher explained that under the agreement they were still to receive their shares of the $3,087 and that they had urged him to meet promptly with Smith (Tr. 292, 879–880, 882–884, 1133). Petitioner Sopher then volunteered that he intended to have the City of Streator pay Smith and Loveless $400 for repairs which the company had made on the installed pumps, despite the fact that the pumps were still covered by a warranty and the city was under no obligation to pay (Tr. 292, 885–888, 1133). He added: "You will get your money back one way or the other" (Tr. 888, 1133). Smith produced an envelope containing $3,087 (Tr. 385–386, 405), and handed it to petitioner Sopher (Tr. 293, 388). Sopher placed the envelope in his coat pocket (Tr. 388). He was arrested shortly thereafter by F.B.I. agents who had observed the transaction (Tr. 293,

389). Sopher protested to the agents that the envelope contained only a gratuitous political contribution (Tr. 402–403).

2. At trial, Smith testified, *inter alia,* concerning his conversation with petitioner Sopher on May 7, 1963 (Tr. 291–293). Eight statements by Smith to government agents, including a statement relating the substance of the May 7 conversation, had earlier been produced for the use of the defense pursuant to 18 U.S.C. 3500 (Tr. 293–294). Subsequently, petitioner Sopher testified concerning the same conversation (Tr. 844–845). He referred to the money in the envelope as funds Smith had said he was going to "contribute" to him, and recounted the discussion of the repair bill as an explanation to Smith that the payment by the city could not be authorized since the pumps were still covered by a warranty (Tr. 845). On cross-examination the government attorney inquired if petitioner Sopher recalled whether the conversation had contained certain language, reading a series of excerpts from a transcript (Tr. 878–897, 907). Petitioner Sopher responded that some of the dialogue could have been included in the conversation, but stated that he did not recall most of the quoted passages (Tr. 878–897). During a recess, counsel for the petitioner Sopher ascertained that the government attorney had been reading from a transcript prepared from a recording of the conversation (Tr. 906–907).

On resumption of the trial proceedings, counsel for petitioner Sopher asserted that the transcript of the recording should have been proffered to the defense

as a statement of Smith subject to production under 18 U.S.C. 3500 at the conclusion of Smith's testimony (Tr. 908, 912). He moved that Smith's testimony be stricken and that a mistrial be declared because of such non-production (Tr. 915). The court denied the motions (Tr. 930–931), ruling that the recording of Sopher's conversation with Smith did not constitute a statement by Smith within the purview of Section 3500 (Tr. 922–924, 927–928, 984). Subsequently counsel for petitioner Sopher attempted to subponea from the government any transcripts of statements or recordings by Boender, Bowlby, or Smith in early 1961 (Tr. 982–983; R. 181). The trial court, after having examined papers tendered him by the government as the only papers approximating the objects described in the subponea, quashed the subponea and further ruled that the papers before him were not subject to production under 18 U.S.C. 3500 (Tr. 1007–1008).[4]

After the defense concluded its case, the government attorney indicated that as part of his rebuttal he intended to play to the jury the recording of the May 7 conversation between Smith and petitioner Sopher (Tr. 1050–1051). Preliminarily, at the government attorney's suggestion, the recording was played for the defense out of the presence of the jury

[4] The tendered papers appear in the certified record within an envelope which is marked "Statements held (1) Not to be Sec. 3500 statements (2) Not to be produceable [*sic*] pursuant to subponea under Rule 17, F.R.Cr.P." and which is signed by the trial court. The envelope contains a transcript of the Sopher-Smith conversation of May 7, 1963, and a transcript of a local radio announcer's interview with Sopher on May 8, 1963.

(Tr. 1050, 1073).[5] Defense counsel had been given a typewritten transcript of the same conversation in order that they might more easily follow the recording (Tr. 1058–1059, 1063). After hearing the tape recording, the trial court ruled that it was admissible in rebuttal (Tr. 1092–1095). The court suggested, however, that a stipulation might be substituted in lieu of playing the recording for the jury, in order that the government's evidence of the conversation not be unnecessarily cumulated (Tr. 1096, 1100). A stipulation was reached and, after presentation of the government's foundation evidence,[6] it was read to the jury by the court (Tr. 1133):

> It is stipulated by all the counsel and the parties that the statements read by [the government attorney] in that cross-examination [of petitioner Sopher in regard to his conversation with Smith in Chicago] are true and correct as reflected on the transcription of that conversa-

[5] In order to afford better audibility, the recording which was played was a tape recording which had been made from the original wire recording. The government had offered to play the original wire (Tr. 1067).

[6] Smith and an F.B.I. agent each testified that, just before Smith's conversation with petitioner Sopher, the agent placed a small wire recorder on Smith's person and turned it on, and that after the conversation the agent turned off the recorder and removed it from Smith (Tr. 1105–1106, 1118–1120). Smith also testified that the recorder remained on throughout the conversation, that he heard the tape played in chambers, and that the tape accurately portrayed the entire conversation he had had with Sopher (Tr. 1106). Two other F.B.I. agents testified that they had made the tape recording from the original wire recording and that the two were identical (Tr. 1122–1126). Both the wire and the tape were received in evidence (Tr. 1131), but neither was played to the jury.

> tion which was made on the wire which is in evidence as Government Exhibit 14.

Counsel for petitioner Sopher added that "those matters appeared among others; the others are not in evidence" (Tr. 1133). The court then confirmed that (Tr. 1133–1134):

> [W]e are not playing the whole transcription because some of it is irrelevant, some of it you have heard as you heard the statements already, but these matters are stipulated to be true and correct and the rest of the tape is not being directed to the attention of the jury at this time.

At no time after hearing the recording and receiving the transcript of the recording did any of the defense counsel request that Smith be recalled to the witness stand for further examination.

3. During the final portion of his summation, counsel for petitioner Sopher argued that the version of the Chicago conversation developed by Sopher in his testimony was not necessarily in conflict with the stipulatedly accurate dialogue read during Sopher's cross-examination. Counsel pointed out that the recording device had an "on-off" button, and argued (Tr. 1268–1269):

> [W]henever, I am sure, anything that was a little unsatisfactory so far as what Smith wanted to develop on this tape was concerned all Smith had to do was to reach inside his coat and punch a button; and so, of course, what Mayor Sopher has told you from the stand or much of it is not on the tape. That is perfectly understandable.

> Furthermore, the government has stipulated with us that what you did hear was but part of the tape that they do have. The rest of it is not—

The government attorney interposed an objection and the court responded (Tr. 1269):

> Yes, Mr. Oliver. I am going to play the whole tape to the jury right now. You have made it impossible for the closing argument in this case to proceed with those statements with reference to the statement about turning the machine on and off. I am going to let the jury hear the whole tape because there are inferences in there which I think are not warranted by the evidence that has been heard.

Counsel replied (Tr. 1270):

> I think they are, your Honor. I would want to be heard out of the presence of the jury.

The jury was excused (Tr. 1270). During the ensuing discussion the court observed that it had suggested a stipulation as to the contents of the recording in order to avoid an unnecessary cumulation of the government's evidence of the incriminating conversation, and stated it felt that counsel had taken improper advantage of the situation by arguing inferences which a playing of the recording would plainly have negated (Tr. 1275, 1282–1284, 1286–1287, 1294–1295, 1304). The court stated that to remedy the matter the tape could be played for the jury (or the transcript of the tape read to the jury) in order that the jurors might draw their own informed conclusions as to the existence of any basis for the argued inferences, or else that counsel could withdraw that portion of

his argument (Tr. 1300–1301, 1304–1306, 1308–1309, 1311, 1313–1315, 1322, 1329–1332). Counsel chose the latter alternative (Tr. 1275, 1300–1301), with the express consent of petitioner Sopher (Tr. 1333) and counsel for petitioners Ramza, Ryan, and Tibbles (Tr. 1328), and with the acquiescence of counsel for petitioner Kerestes. Upon the return of the jury, counsel stated (Tr. 1335–1336):

> Vis-a-vis my comments just before the recess, I should like the jury to understand that in my opinion the record will not sustain the inference that the machine which Mr. Smith had fastened to his body on May 7, 1963, was in fact turned on or off by Smith during that conversation, and I think it also will not sustain the inference that there was matter on that tape which tended to corroborate Mayor Sopher's version of the conversation but which was not stipulated to.

Immediately thereafter the court instructed (Tr. 1336–1337):

> Let me simply observe that in light of those statements the jury will disregard any inferences which might have been drawn had those statements not been withdrawn. And let me say further, as I will tell you formally in the instructions, that any colloquy which I may have with counsel has no bearing whatsoever on the determination which you must make of whether or not the government has established beyond a reasonable doubt the guilt of the defendants. Counsel are not on trial. They are simply representing the people who are on trial and my job is to preside over a trial and to

> maintain as far as possible an orderly and fair proceedings [*sic*]. So I want you to understand that the fact that there may have been colloquy between counsel and me is not in any way to affect your judgment as to the merits of the position of any of the defendants in this case.

Counsel for petitioner Sopher then resumed and completed his final argument (Tr. 1337–1341). During its general charge to the jury the court again instructed that no inference whatever as to any defendant was to be drawn from the above colloquy with counsel, and that the case was to be decided solely on the basis of the evidence (Tr. 1385, 1399). After the jury had retired, counsel for all petitioners renewed their motions for a mistrial (Tr. 1406), which had first been made during the discussion in chambers (Tr. 1295–1296, 1299–1300, 1334). The motions were denied (Tr. 1406).[7]

ARGUMENT

1. The denial of petitioner Kerestes' motion for a severance was within the sound discretion of the trial court. The defendants, who acted together in what was essentially one transaction, were properly tried together. The court's clear and repeated admonitions to the jury as to the limited consideration to be given

[7] In a special proceeding after the verdicts had been returned (Tr. 1416), the trial court held counsel for petitioner Sopher in contempt of court for engaging in the above improper argument to the jury (Tr. 1420–1422). On appeal, the court of appeals reversed the contempt conviction, holding that although the argument was improper, the record did not show that the impropriety was deliberate, contemptuous, or obstructive. *United States* v. *Sopher*, 347 F. 2d 415, 418 (C.A. 7).

the statements of the individual petitioners (Tr. 21–25, 272–273, 285, 1396–1398, 1400) avoided any confusion which might otherwise have arisen because of the joint trial. *Opper* v. *United States*, 348 U.S. 84, 95. The argument of petitioner Kerestes, that the joint trial precluded his calling his co-defendants as witnesses in his behalf, is unrealistic. There is nothing in the facts of this case to justify an assumption that a co-defendant would have been more willing to waive his privilege when called as a witness at a separate trial than to take the stand at a joint trial. *Gorin* v. *United States*, 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829.[8]

2. No prejudicial error occurred by reason of the fact that, at the conclusion of Smith's direct examination, the government did not then deliver to the defense the transcript of the recording of the May 7 conversation between Smith and petitioner Sopher. A transcript of such a conversation between a defendant and the victim of the alleged crime has been held not to be a statement subject to production under 18

[8] The holding in the case on which petitioner Kerestes relies (Pet. No. 451, pp. 25–26), *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7), is limited to its particular facts. There, in assessing whether the co-defendant (Arrington) would have testified for Echeles in a separate trial, the court noted (352 F. 2d at 898):

> [I]t would in fact seem more likely than not that Arrington would have testified for Echeles for the reason that three times previously, in open court, Arrington had voluntarily exculpated Echeles, apparently contrary to his own penal interest.
>
> * * * [W]e hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence * * *, it was error to deny the motion for a separate trial.

U.S.C. 3500, *Battaglia* v. *United States*, 349 F. 2d 556, 560 (C.A. 9), certiorari denied, 382 U.S. 955.

In any event, even prior to Smith's testimony on direct examination, the government had turned over to the defense eight statements by Smith to government agents, including a statement dated May 8, 1963, in which Smith had accurately related the substance of the conversation with petitioner Sopher (Tr. 293–294).[9] Since the defense possessed this latter statement for use in cross-examination, the absence of the transcript of the recording did not operate to petitioners' prejudice. *Killian* v. *United States*, 368 U.S. 231, 243–244; *Rosenberg* v. *United States*, 360 U.S. 367, 371. Additionally, after the several counsel for petitioners had been given a copy of the transcript later in the trial, and after they had heard the recording itself, none requested that Smith be recalled for further questioning regarding the conversation. Petitioners thus had an opportunity to use the transcript in examining Smith, but made no attempt to exercise it.[10]

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[9] The statement is set forth in an F.B.I. report dated May 9, 1963, the date used to refer to the statement at trial (Tr. 294). A copy has been lodged with the Clerk of this Court.

[10] No need thus exists for this Court to consider whether the Seventh Circuit's construction of 18 U.S.C. 3500 (Pet. No. 451, App. A, pp. 5–6) was proper. Similarly, no question under this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83, is presented here, despite petitioners' purported reliance on that case. No suppression of evidence was in fact involved here, since pe-

Petitioners, other than petitioner Kerestes, further argue that the trial court improperly quashed the subpoena directed to any other recordings of conversations between petitioners and Smith, Boender, or Bowlby in early 1961 (Pet. No. 455, pp. 9–10). There were no such recordings. At the time the matter was first raised, the trial court pointed out to the defense that the events concerning which counsel sought possible government recordings had taken place prior to the time the government had been informed of the existence of the offense, and that, therefore, there could be no such recordings (Tr. 941). When the defense persisted, and the government tendered the court the only two transcripts of recorded conversations in its possession—the Sopher-Smith conversation of May 7, 1963, and petitioner Sopher's radio interview of May 8, 1963—the trial court properly quashed the defense subpoena (Tr. 1007–1008; see note 4, *supra*).[11]

3. The trial court did not abuse its discretion in refusing to declare a mistrial following the interruption of the final argument of counsel for petitioner Sopher. The jury heard only the government's ob-

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titioners' counsel were provided with a transcript of the tape recording during the course of the trial and had an opportunity to cross-examine Smith with respect thereto.

[11] Apart from the Jencks Act question which they raise with respect to wire recording of the Sopher-Smith conversation of May 7, 1963, none of petitioners here assert that it was improperly used, in a constitutional sense, at trial. Thus, no Fourth Amendment issues are presented here. Compare *Lopez* v. *United States*, 373 U.S. 427, and the argument in petitioner's brief, pp. 26–36, in *Osborn* v. *United States*, No. 29, this Term. See Pet. No. 451, p. 16.

jection, the court's statement that counsel had made it impossible to proceed without playing the tape to the jury "because there are inferences in there which I think are not warranted by the evidence that has been heard," counsel's statement that he thought they were warranted, and, after the conference in chambers, counsel's statement that in his opinion the record would not sustain the two inferences involved (Tr. 1269–1270, 1335–1336). In view of the obvious impropriety of counsel's remarks, to which objection was made, the relatively innocuous nature of the exchange, and the court's prompt, repeated admonitions that the colloquy was to have no bearing on the jury's determinations and that no inference whatever as to any defendant was to be drawn from it (Tr. 1336–1337, 1385, 1399), there were no grounds for a mistrial. See *Shockley* v. *United States,* 166 F. 2d 704, 711–712 (C.A. 9), certiorari denied, 334 U.S. 850; *Fredrick* v. *United States,* 163 F. 2d 536, 547–548 (C.A. 9), certiorari denied, 332 U.S. 775.

Petitioner Sopher also contends that he was deprived of effective representation of counsel since counsel was forced to abandon a defense. Counsel, however, did not abandon anything he could properly have asserted. The two inferences urged in his argument would plainly have been negated by a playing of the tape—a tape which had been ruled admissible but for which a less revealing stipulation had been substituted to avoid cumulating the government evidence. Counsel's attempt to take advantage of the situation was found improper by both the trial court and by the court of appeals in reviewing the later contempt conviction (347 F. 2d 415, 418). Moreover, had counsel

felt that the argued inferences were supportable, he could have elected to adhere to his argument and to have the tape played for the jury. Both he and petitioner Sopher, however, favored the retraction (Tr. 1333).[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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[12] Petitioner Kerestes questions, but does not argue, whether the facts of this case involve an interference with interstate commerce within the meaning of the Hobbs Act, 18 U.S.C. 1951 (Pet. No. 451, p. 3.) The evidence demonstrated that petitioners instilled in Smith the fear that his company's bid to sell the Kansas-made pumps to the Illinois city would not be accepted or approved unless Smith and Loveless agreed to pay ten percent of the bid price. Had the bid not been accepted, there would have been no interstate shipment of pumps. Since the statute outlaws interference in any way or degree, the interference in the present case was sufficient. Cf. *Stirone* v. *United States*, 361 U.S. 212, 215; *Carbo* v. *United States*, 314 F. 2d 718, 732 (C.A. 9), certiorari denied, 377 U.S. 953. See note 2, *supra*.

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